APPEAL NO. 030739
FILED MAY 13, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 16 and November 8, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant's current cauda equina condition is the direct and natural result of the claimant's compensable injury of _____; and that the appellant (self-insured) waived its right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The self-insured appealed, and the claimant responded.

DECISION

Affirmed.

Initially, we note that in her timely filed response, the claimant objects to the hearing officer's ruling adding the issue regarding the claimant's current cauda equina condition at the request of the self-insured. Because the claimant's response was not filed within the time period for filing an appeal (under Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.5(d) and 143.3 (Rules 102.5(d) and 143.3) a request for appeal by the claimant was due by April 1, 2003), we do not consider on appeal the claimant's objection to the addition of the issue regarding the current cauda equina condition.

Conflicting evidence was presented with regard to the issues of whether the claimant sustained a compensable injury on _____, and whether her current cauda equina condition is the direct and natural result of the compensable injury. The hearing officer resolved the conflicts in the evidence in favor of the claimant. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the inconsistencies and conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's determinations that the claimant sustained a compensable injury on _____, and that the claimant's current cauda equina condition is the direct and natural result of the compensable injury are supported by sufficient evidence and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the waiver issue, in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 24, 1994, which was received by the Texas Workers' Compensation Commission (Commission) on February 28, 1994, the self-insured noted that it first received written notice of the claimant's injury of _____, on February 15, 1994, and it disputed the compensability of the

injury. Pursuant to Section 401.011(27), an insurance carrier includes a certified self insurer for workers' compensation insurance.

In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In the instant case, the self-insured's TWCC-21 contesting compensability was not filed with the Commission within seven days after it received written notice of the injury, but was filed with the Commission after the seventh day and before the 60th day after it first received written notice of the injury.

The self-insured asserts that as of the date the TWCC-21 was filed, no benefits were owed to the claimant and cites Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, in support of its contention that the TWCC-21 was timely filed. In a recent decision, Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated that "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." The Appeals Panel also stated that it would decline to follow Appeal No. 023010-s and held that "to comply with the Supreme Court's holding in Downs, the carrier has the burden to prove that it 'took some action within seven days,' and to present evidence indicating the action taken." The Appeals Panel went on to state in Appeal No. 030380-s that "Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury." In Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003, the Appeals Panel cited Appeal No. 030380-s in determining that the carrier in that case had waived its right to contest compensability, and noted that a carrier cannot simply sit back and rely on the fact that benefits did not accrue prior to the date it filed its dispute and argue that it did not waive its right to contest compensability. In the instant case, there is no evidence that within seven days of receiving written notice of the injury, the self-insured took any action indicating that it had accepted the claim or intended to pay benefits. In accordance with our decision in Appeal No. 030380-s, we conclude that in the instant case the hearing officer did not err in determining that the self-insured waived its right to contest compensability of the injury.

The self-insured asserts that it is inappropriate to retroactively apply the Downs decision. In Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel applied the decision in Downs and noted that "On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day 'pay or dispute' provision, is now final." In subsequent decisions, the Appeals Panel has rejected the contention that the decision in Downs should not be applied

retroactively, noting that Commission Advisory 2002-15 (September 12, 2002) provides that "All previous Advisories issued by the Commission regarding this issue are superceded by this Advisory and the Supreme Court decision." Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002, Texas Workers' Compensation Commission Appeal No. 022582, decided November 25, 2002.

The self-insured asserts that the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), applies to the facts of the instant case. In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has held that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. In the instant case, the hearing officer found that the claimant has a back injury, and since that finding is supported by the evidence we do not find the Williamson decision to be applicable.

The self-insured cites Rules 124.2 and 124.3 in support of its assertion that a notice of refusal to pay is not required until benefits are due. As was explained in the Downs decision, "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." Since there is no evidence that the self-insured took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice of the injury, it waived its right to contest compensability. Appeal Nos. 030380-s and 030663-s, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 022876, decided January 2, 2003, wherein the Appeals Panel held that a hearing officer was incorrect in applying Rule 124.3(a)(2) to limit benefits to the time period between the injury and the subsequent dispute by the carrier where the carrier had waived its right to dispute compensability of the injury.

The self-insured asserts that application of the Downs decision in the instant case constitutes an impermissible, unconstitutional sanction and deprives it of its constitutional rights. In Downs, the Texas Supreme Court construed and applied Sections 409.021 and 409.022 of the 1989 Act, and in the instant case, the hearing officer applied the Downs decision to the facts of the case. We do not find error in the hearing officer's application of Downs. Administrative agencies have no power to determine the constitutionality of statutes. Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge